

COPY

RECEIVED
FEDERAL ELECTION
COMMISSION

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

2011 AUG 31 AM 9: 12

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6357

DATE COMPLAINT FILED: August 25, 2010

DATE OF NOTIFICATION: August 31, 2010

LAST RESPONSE RECEIVED: October 18, 2010

DATE ACTIVATED: February 7, 2011

EXPIRATION OF SOL: August 17, 2015

COMPLAINANT:

Chris Redfern, Chairman, Ohio Democratic Party

RESPONDENTS:

American Crossroads and Margee Clancy, in her
official capacity as treasurer
Portman for Senate Committee and Natalie K. Baur,
in her official capacity as treasurer

RELEVANT STATUTES AND
REGULATIONS:

2 U.S.C. § 434(b)
2 U.S.C. § 441a(a)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b
11 C.F.R. § 100.26
11 C.F.R. § 109.21
11 C.F.R. § 109.23

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter concerns allegations that American Crossroads, an independent expenditure-only political committee registered with the Commission, made an excessive contribution to the Portman for Senate Committee ("Portman Committee" or "Committee"), Rob Portman's principal campaign committee for U.S. Senate in Ohio in 2010, when it spent \$454,341.80 to create and air a television advertisement that included video footage previously produced as part of Portman Committee campaign materials. Complainant also asserts that because American

12044312188

1 Crossroads made a contribution by republishing campaign materials, it was no longer permitted
2 to avail itself of the exception to contribution limits for independent expenditure-only political
3 committees; and that therefore, every subsequent contribution American Crossroads accepted in
4 excess of \$5,000, or from a corporation, labor union, or other prohibited source resulted in a
5 violation of the Federal Election Campaign Act of 1971, as amended ("the Act").

6 We recommend that the Commission find reason to believe that American Crossroads
7 and Margee Clancy, in her official capacity as treasurer, violated 2 U.S.C. §§ 441a(a) and 434(b)
8 by making an excessive in-kind contribution as a result of republishing campaign materials and
9 by failing to properly disclose the cost of the communication as a contribution. We also
10 recommend that the Commission enter into pre-probable cause conciliation with American
11 Crossroads in connection with the excessive in-kind contribution and reporting violation. We
12 recommend that the Commission dismiss, as a matter of prosecutorial discretion, the allegation
13 that American Crossroads and Margee Clancy, in her official capacity as treasurer, violated
14 2 U.S.C. §§ 441a(f) and 441b by accepting excessive and prohibited contributions, and send a
15 caution letter.

16 Although the complaint does not specifically allege that American Crossroads
17 coordinated the advertisement with the Portman Committee, we also include a coordination
18 analysis because as the recipient committee of an alleged republication benefit, the Portman
19 Committee does not receive or accept an in-kind contribution, and is not required to report an
20 expenditure, unless the dissemination, distribution, or republication of campaign materials is a
21 coordinated communication. 11 C.F.R. § 109.23(a). Because the available information indicates
22 that the video footage at issue was obtained from a publicly available source and that the
23 advertisement was not coordinated with the Portman Committee, we recommend the

12044312189

Commission find no reason to believe that the Portman Committee violated 2 U.S.C. § 441a(f) by accepting an excessive in-kind contribution from American Crossroads in the form of a coordinated communication.

II. FACTUAL SUMMARY

A. Background

American Crossroads registered with the Commission as an independent expenditure-only political committee on August 10, 2010. Following the decision in *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), and consistent with the Commission's guidance in Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten), American Crossroads submitted a letter with its Statement of Organization that stated that it intended to raise funds in unlimited amounts, but would not use those funds to make contributions to federal candidates or committees, whether direct, in-kind, or via coordinated communications. Letter from Margee Clancy dated August 9, 2010. During 2010, American Crossroads reported receiving \$26,402,678.04 in contributions and making \$21,652,778.95 in independent expenditures.

On August 17, 2010, American Crossroads began airing a thirty second television advertisement entitled "Jobs for Ohio," which promotes Rob Portman, a candidate for Senate in Ohio. See <http://www.youtube.com/watch?v=Cy3xKL4v1c8>. The voice-over narration of the advertisement praises Portman's efforts to create jobs in Ohio and exhorts the listener to "Vote Rob Portman." The advertisement contains several short segments of video footage of Rob Portman talking to individuals or groups, walking in a parade with his family, eating with a group at a picnic table, and speaking at a podium holding up a brochure entitled "Portman Plan to Create Ohio Jobs." *Id.* The video footage of Portman comprises approximately ten to fifteen seconds of the thirty second advertisement. American Crossroads filed an independent

12044312190

1 expenditure report on August 17, 2010 indicating that the group spent a total of \$454,341.80 on
2 the "Jobs for Ohio" advertisement, including \$14,341.80 for production costs and \$440,000.00
3 for television placement.

4 **B. Excessive In-Kind and Prohibited Contribution Allegations**

5 The complaint alleges that American Crossroads made an excessive in-kind contribution
6 to the Portman Committee because the Committee spent \$454,341.80 to fund a television
7 advertisement that included brief republished segments of several different Portman Committee
8 campaign materials. See 2 U.S.C. § 441a(a) and 11 C.F.R. § 109.23(a); see also MUR 5743
9 (Betty Sutton for Congress). Complaint at 5. The complaint claims that almost all of the video
10 footage from the "Jobs for Ohio" advertisement was taken from a campaign video produced,
11 created, and distributed by the Portman Committee. See
12 <http://www.youtube.com/watch?v=10r6Y6cmoi4>. Complaint at 4.

13 In addition, because American Crossroads registered as an independent expenditure-only
14 political committee, the complaint contends that it was not permitted to make contributions of
15 any amount to federal candidates or political committees. Complaint at 5. Accordingly, the
16 complaint asserts that subsequent to the "Jobs for Ohio" advertisement, American Crossroads is
17 bound by the limitations and source prohibitions of the Act, and that American Crossroads
18 violated the Act each time it accepted a contribution in excess of the \$5,000 limit for
19 contributions to political committees, or from a corporate or labor organization. See 2 U.S.C.
20 §§ 441a(f) and 441b. Complaint at 6. The complaint also alleges that any donor who
21 contributed an excessive amount or constituted a prohibited source, likewise violated the
22 Act. *Id.*

12044312191

American Crossroads' response and the attached affidavit of Carl Forti, the Political Director of American Crossroads, assert that the advertisement was produced independently of the Portman Committee and that American Crossroads personnel had no contact with the Portman Committee. American Crossroads Response at 1-2 and Affidavit of Carl Forti at ¶¶ 4-5. The response and affidavit explain that no material in the advertisement was obtained directly from the Portman campaign, and that all content in the advertisement not produced by American Crossroads was obtained through public domain internet sources, including YouTube. *Id.* The response does not dispute that the footage on YouTube was labeled as having been posted by the Portman campaign.

American Crossroads asserts that even if the footage at issue was created by the Portman Committee before it was disseminated on the internet and therefore implicates the Commission's republication regulations, the use of the footage qualifies for the exception to the republication regulation for material that "consists of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views." See 11 C.F.R. § 109.23(b).

American Crossroads Response at 2. American Crossroads also contends that the facts in this matter are closer to MUR 5865 (New Trier Democratic Organization) (Commission found no reason to believe a republication violation occurred when the source of the candidate photograph at issue was not established, but it was available from numerous public domain sources on the internet) than MUR 5743 (Betty Sutton for Congress) (Commission found reason to believe a republication violation occurred and admonished respondent Emily's List for republication of photographs obtained directly from the candidate's website). American Crossroads Response at 3-4. The response argues that American Crossroads did not engage in any activity that resulted

12044312192

1 in an in-kind contribution to the Portman Committee and therefore did not threaten its status as
2 an independent expenditure-only committee. *Id.* at 5.

3 The Portman Committee contends that the facts alleged in the complaint do not constitute
4 a violation of the Act. Portman Committee Response at 1. The response states that the video at
5 issue is publicly available on YouTube and that no one at the Committee had any contact with
6 American Crossroads about this or any other communication. *Id.* The response argues that
7 under the Commission's regulations and precedent, a campaign cannot be held liable if a third
8 party republishes campaign material that is publicly available on the internet. *Id.*

9 **III. ANALYSIS**

10 **A. Republication**

11 Under the Act, "the financing by any person of the dissemination, distribution, or
12 republication, in whole or in part, of any broadcast or any written, graphic, or other form of
13 campaign materials prepared by the candidate, his campaign committees, or authorized agents
14 shall be considered an expenditure." 2 U.S.C. § 441a(a)(7)(B)(iii). Further, the republication of
15 campaign materials prepared by a candidate's authorized committee is considered a contribution
16 for purposes of contribution limitations and reporting responsibilities of the person making the
17 expenditure. 11 C.F.R. § 109.23. In its Explanation and Justification for the republication
18 provision, the Commission explained that the person financing the republication essentially "has
19 provided something of value to the candidate [or] authorized committee." Explanation and
20 Justification, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 442 (Jan. 3, 2003).
21 The Commission further explained that "Congress has addressed republication of campaign
22 material through 2 U.S.C. § 441a(a)(7)(B)(iii) in a context where the candidate/author generally
23 views republication of his or her campaign material, even in part, as a benefit" and "can be

12044312193

1 reasonably construed only as for the purpose of influencing an election." 68 Fed. Reg. at 443;
2 Explanation and Justification, *Coordinated Communications*, 71 Fed. Reg. 33190, 33191
3 (June 8, 2006).

4 With respect to republication of internet materials, in its rulemaking on internet
5 communications, the Commission adopted an exemption for grassroots activity that allows
6 individuals to republish campaign materials using the internet without making a contribution or
7 expenditure. 11 C.F.R. §§ 100.94 and 100.155; Explanation and Justification, *Internet*
8 *Communications*, 71 Fed. Reg. 18589, 18604 (April 12, 2006). However, the Commission
9 specifically noted that 11 C.F.R. § 100.94(e) does not exempt from the definition of
10 "contribution" any "public communication" that arises as the result of the republication of such
11 materials.¹ For example, a contribution would result if an individual downloaded a campaign
12 poster from the internet and then paid to have the poster appear as an advertisement in the New
13 York Times. *Id.*

14 American Crossroads' "Jobs for Ohio" advertisement includes several short pieces of
15 video footage, which do not contain any audio, that were a small part of several longer videos
16 produced by the Portman Committee. The complaint identifies a YouTube video, "Portman
17 Celebrate Memorial Day," posted by the YouTube user "PortmanforSenate" on June 1, 2010, as
18 the source of a portion of the footage of Rob Portman contained in the advertisement. See
19 <http://www.youtube.com/watch?v=10r6Y6cmoi4>. The two minute and sixteen second long
20 video shows images of Rob Portman and his family celebrating Memorial Day by walking in a

¹ A "public communication" is defined as a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general public political advertising. 11 C.F.R. § 100.26.

1 parade, attending a barbeque, and talking to the public. A disclaimer at the end of that video
2 states that it was paid for by the Portman Committee. It appears that several short segments of
3 video footage in the "Jobs for Ohio" advertisement, including footage of Portman walking in a
4 parade with his family and eating with a group at a picnic table, were obtained from the
5 "Portman's Celebrate Memorial Day" YouTube video.

6 We identified a second video posted on the YouTube website that appears to be the
7 source of additional images of Rob Portman contained in the "Jobs for Ohio" advertisement. See
8 <http://www.youtube.com/watch?v=3Xs3j8gjb08>. The three minute and twenty-four second
9 video, entitled "Portman's Statewide Jobs Tour," was posted by the YouTube user "robportman"
10 on May 10, 2010. A disclaimer at the end of the video also states that it was paid for by the
11 Portman Committee. It appears that video footage of Rob Portman talking to individuals or
12 groups of workers and speaking at a podium holding up a brochure entitled "Portman Plan to
13 Create Ohio Jobs" in the "Jobs for Ohio" advertisement was obtained from the "Portman's
14 Statewide Jobs Tour" YouTube video.

15 In total, all of the video footage in American Crossroads "Jobs for Ohio" advertisement
16 that appears to have been obtained from the two Portman Committee YouTube videos comprises
17 approximately ten to fifteen seconds of the thirty second advertisement. Because the "Jobs for
18 Ohio" advertisement uses clips of video footage from campaign videos that were prepared by the
19 Portman Committee, American Crossroads republished content previously used in Portman
20 campaign materials. See 2 U.S.C. § 441a(a)(7)(B)(iii) and 11 C.F.R. § 109.23. By using the
21 Portman campaign video footage, American Crossroads appears to have made an in-kind
22 contribution to the Portman Committee.

12044312195

1 The republication of campaign materials in this matter is similar to MUR 5879
2 (Democratic Congressional Campaign Committee) ("DCCC"). In that matter, the DCCC spent
3 \$427,485.25 to produce and disseminate a television advertisement that used video footage of
4 candidate Harry Mitchell that was filmed and provided by the Mitchell Committee. The video
5 footage at issue depicted Mitchell interacting with constituents, included shots of Mitchell
6 directly facing the camera, and comprised approximately fifty percent of the DCCC's thirty-
7 second advertisement. See MUR 5879 General Counsel's Report #2 at 1-2. The DCCC
8 advertisement used brief segments of video footage from two longer videos provided by the
9 Mitchell campaign. See *id.* at note 3. In contrast to the American Crossroads advertisement, the
10 Mitchell Committee provided a copy of the footage to the DCCC through the Committee's media
11 vendor, and the Mitchell Committee utilized the same footage in a separate advertisement that
12 aired twenty-four hours after the DCCC advertisement. See *id.* at 1 and 4. The Commission
13 found reason to believe that the DCCC violated 2 U.S.C. §§ 441(a) and 434(b) in connection
14 with the republication of the Mitchell Committee's campaign materials, but split 3-3 on the
15 Office of General Counsel's recommendation to enter into pre-probable cause conciliation with
16 the DCCC after an investigation into the circumstances of the republication. See MUR 5879
17 Certifications dated October 11, 2007 and April 15, 2010.

18 In contrast to MUR 5879, the Commission has either admonished committees or
19 dismissed matters where the republished materials represented an incidental part of the
20 advertisement, or the value of the materials was likely *de minimis*. See MUR 5743 (Betty Sutton
21 for Congress) (Commission admonished a committee where the republished photographs of the
22 candidate obtained directly from the candidate's website were likely of *de minimis* value); MUR
23 5996 (Tim Bee) (Commission was unable to agree on whether an independent group's use of a

12044312196

1 "head shot" photograph of a candidate constituted republication, but because the photograph was
2 downloaded at no charge from a candidate's publicly available website and was a small portion
3 of the television advertisement at issue, the Commission voted to exercise its prosecutorial
4 discretion and dismiss the allegation that the group made an excessive or prohibited
5 contribution).

6 Unlike MUR 5743 (Betty Sutton for Congress) and MUR 5996 (Tim Bee), the video
7 footage of Rob Portman republished from the Portman Committee YouTube videos is not
8 incidental to the advertisement as a whole. The republished footage comprises a significant
9 portion, ten to fifteen seconds out of thirty seconds, of the American Crossroads advertisement,
10 similar to the volume of footage in MUR 5879 (DCCC). The video footage is not simply a
11 photograph of the candidate, but rather footage from campaign-produced videos containing
12 images designed to depict Portman in a favorable light. Although the American Crossroads
13 advertisement does not republish the entirety of the Portman Committee YouTube videos, the
14 Act specifies that the republication of campaign materials "in whole or in part" is an expenditure.
15 2 U.S.C. § 441a(a)(7)(B)(iii). *See also* 68 Fed. Reg. 443 (stating that "Congress has addressed
16 republication...even in part, as a benefit to the candidate). In addition, several of the video
17 segments convey the advertisement's theme of Portman's efforts to create jobs in Ohio. The
18 republished campaign materials depict Portman speaking to workers and Portman speaking at a
19 podium holding a brochure entitled "Portman Plan to Create Ohio Jobs," both images that
20 convey meaning that is central to the advertisement's message.

21 Although the video footage at issue was not obtained directly from the Portman
22 Committee website, the source videos were clearly labeled on YouTube as being posted by the
23 Portman campaign, under the usernames "PortmanforSenate" and "robportman." Both videos

12044312197

1 also contained a disclaimer that they were paid for by the Portman Committee. Thus, in using
2 identified campaign materials rather than other publicly available footage of Portman, American
3 Crossroads deliberately chose to use the depictions previously published by the campaign on
4 YouTube, and spent \$454,341.80 to disseminate the footage to thousands of television viewers
5 and voters in Ohio. By republishing Portman campaign materials in a television advertisement,
6 American Crossroads certainly "provided something of value to the candidate [or] authorized
7 committee." See 68 Fed. Reg. 442.

8 Although American Crossroads contends that the use of the video falls under the
9 exception for material that "consists of a brief quote of materials that demonstrate a candidate's
10 position as part of a person's expression of its own views," this exception is inapplicable because
11 the video does not "quote" the candidate on a particular issue. See 11 C.F.R. § 109.23(b).
12 Rather it is a video depiction of the candidate in a favorable manner previously selected by the
13 Committee. Accordingly, we recommend that the Commission find reason to believe that
14 American Crossroads and Margee Clancy, in her official capacity as treasurer, violated 2 U.S.C.
15 §§ 441a(a) and 434(b) by making an excessive in-kind contribution as a result of republishing
16 campaign materials and by failing to properly disclose the cost of the communication as a
17 contribution.

18 By making an in-kind contribution to the Portman campaign, American Crossroads fell
19 into non-compliance with its assurances that it would not make contributions to federal
20 committees, including in-kind contributions. See Letter from Margee Clancy dated
21 August 9, 2010. However, we recommend that the Commission dismiss, as a matter of
22 prosecutorial discretion, the allegation that American Crossroads and Margee Clancy, in her
23 official capacity as treasurer, thereby lost its status as an independent expenditure-only

12044312198

1 committee and violated 2 U.S.C. §§ 441a(f) and 441b by accepting excessive and prohibited
2 contributions subsequent to its disbursement for the "Jobs for Ohio" advertisement.
3 *See Heckler v. Chaney*, 470 U.S. 821 (1985).

4 In *Emily's List v. FEC*, the court determined that with regard to non-connected political
5 action committees making independent expenditures, contributions for this purpose are not
6 limited and may be made from a "general treasury account that is not subject to source and
7 amount limit," or "soft money." 581 F.3d 1, 27 (D.C. Cir. 2009). Subsequently, in *Carey v.*
8 *FEC*, the court granted plaintiffs' request for a preliminary injunction, ordering the Commission
9 not to enforce contribution source and amount limitations against plaintiffs with regard to funds
10 being raised for independent expenditures, as long as the National Defense PAC maintains
11 separate bank accounts for its federal and nonfederal funds, and proportionally pays related
12 administrative costs. No. 11-259 at 20 (D.D.C. June 14, 2011). The Commission subsequently
13 stipulated that the plaintiffs did not need to establish separate political committees in order to
14 receive both unlimited contributions to make independent expenditures and contributions subject
15 to the limits and prohibitions of the Act to be used to make contributions. *Id.*; *See also*, No. 11-
16 259-RMC (D.D.C. August 19, 2011).

17 While it appears that American Crossroads' in-kind contribution to the Portman
18 Committee did not comply with the restrictions on independent expenditure-only political
19 committees, we recommend that the Commission dismiss the allegations that American
20 Crossroads violated sections 441a(f) and 441b by accepting excessive and prohibited
21 contributions and caution American Crossroads that it must refrain from making further
22 contributions to candidates, in-kind or direct, with funds outside the limits and prohibitions of the
23 Act in order to maintain its independent expenditure-only committee status. First, American

12044312199

1 Crossroads appears to have believed that it was making an independent expenditure when it
2 sponsored the "Jobs for Ohio" advertisement because it had done so without the knowledge or
3 involvement of the Portman Committee. Second, although the American Crossroads ads were
4 broadcast outside the D.C. Circuit, both *Emily's List* and *Carey* support the proposition that a
5 single organization can both make independent expenditures with funds outside the limits and
6 prohibitions of the Act, and also make contributions with funds that comply with the limits and
7 prohibitions of the Act. Thus, American Crossroads, without losing its ability to make
8 independent expenditures from unlimited funds, may be able to properly make contributions in
9 the future if it establishes two separate bank accounts. Under these circumstances, a dismissal
10 with caution is appropriate with respect to the allegations that American Crossroads violated
11 2 U.S.C. §§ 441a(f) and 441b.

12 B. Coordination Analysis

13 As the recipient committee of an alleged republication benefit, the Portman Committee,
14 which prepared the original video footage of the candidate, does not receive or accept an in-kind
15 contribution, and is not required to report an expenditure, unless the dissemination, distribution,
16 or republication of campaign materials is a coordinated communication. 11 C.F.R. § 109.23(a).
17 Under the Act, an expenditure made by any person "in cooperation, consultation, or concert,
18 with, or at the request or suggestion of, a candidate, his authorized political committees or their
19 agents" constitutes an in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i). A communication is
20 coordinated with a candidate, a candidate's authorized committee, or agent of the candidate or
21 committee when the communication satisfies the three-pronged test set forth in 11 C.F.R.
22 § 109.21(a): (1) the communication is paid for by a person other than that candidate or
23 authorized committee; (2) the communication satisfies at least one of the content standards set

12044312200

1 forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the conduct
2 standards set forth in 11 C.F.R. § 109.21(d). The Commission's regulations at 11 C.F.R. § 109.21
3 provide that coordinated communications constitute in-kind contributions from the party paying
4 for such communications to the candidate, the candidate's authorized committee, or the political
5 party committee which coordinates the communication. As an in-kind contribution, the costs of
6 coordinated communications must not exceed a political committee's applicable contribution
7 limits. See 2 U.S.C. § 441a.

8 **1. Payment**

9 The payment prong of the coordination regulation, 11 C.F.R. § 109.21(a)(1), is satisfied.
10 American Crossroads filed an independent expenditure report on August 17, 2010 disclosing that
11 the group spent a total of \$454,341.80 on the "Jobs for Ohio" advertisement. The
12 advertisement's disclaimer also states that American Crossroads paid for it.

13 **2. Content**

14 The content prong of the coordination regulation is also satisfied. The content prong is
15 satisfied if a communication meets at least one of the following content standards: (1) a
16 communication that is an electioneering communication under 11 C.F.R. § 100.29; (2) a public
17 communication that disseminates, distributes, or republishes, in whole or in part, campaign
18 materials prepared by a candidate or the candidate's authorized committee; (3) a public
19 communication that expressly advocates the election or defeat of a clearly identified candidate
20 for Federal office; or (4) a public communication, in relevant part, that refers to a clearly
21 identified House or Senate candidate, and is publicly distributed or disseminated in the clearly
22 identified candidate's jurisdiction 90 days or fewer before the candidate's primary election. See
23 11 C.F.R. § 109.21(c).

12044312201

1 The "Jobs for Ohio" advertisement identified Senate candidate Rob Portman and was
2 broadcast on television in the State of Ohio on August 17, 2010, 77 days before the
3 November 2, 2010 election. Thus, it qualifies as a public communication referring to a clearly
4 identified candidate distributed within 90 days of an election.

5 **3. Conduct**

6 The Commission's regulations set forth the following six types of conduct between the
7 payor and the committee, whether or not there is agreement or formal collaboration, that satisfy
8 the conduct prong of the coordination standard: (1) the communication "is created, produced, or
9 distributed at the request or suggestion of a candidate or an authorized committee," or if the
10 communication is created, produced, or distributed at the suggestion of the payor and the
11 candidate or authorized committee assents to the suggestion; (2) the candidate, his or her
12 committee, or their agent is materially involved in the content, intended audience, means or
13 mode of communication, the specific media outlet used, or the timing or frequency of the
14 communication; (3) the communication is created, produced, or distributed after at least one
15 substantial discussion about the communication between the person paying for the
16 communication, or that person's employees or agents, and the candidate or his or her authorized
17 committee, his or her opponent or opponent's authorized committee, a political party committee,
18 or any of their agents;² (4) a common vendor uses or conveys information material to the
19 creation, production or distribution of the communication; (5) a former employee or independent
20 contractor uses or conveys information material to the creation, production or distribution of the

² A "substantial discussion" includes informing the payor about the campaign's plans, projects, activities, or needs, or providing the payor with information material to the communication. See 11 C.F.R. § 109.21(d)(3).

12044312202

1 communication; and (6) the dissemination, distribution, or republication of campaign materials.

2 11 C.F.R. § 109.21(d)(1)-(6).

3 A communication that republishes campaign materials prepared by a candidate's
4 authorized committee is an expenditure and a contribution for purposes of contribution
5 limitations and reporting responsibilities of the person making the expenditure, regardless of
6 whether the communication was coordinated with the authorized committee. See 2 U.S.C.
7 § 441a(a)(7)(B)(iii) and 11 C.F.R. § 109.23. However, in considering whether the recipient
8 committee of an alleged republication benefit receives or accepts an in-kind contribution in the
9 coordination context, the republication conduct standard applies only if there was a request or
10 suggestion, material involvement, or substantial discussion that took place after the original
11 preparation of the campaign materials that are disseminated, distributed, or republished. See
12 11 C.F.R. § 109.21(d)(6).

13 The material involvement and substantial discussion standards of the conduct prong are
14 not satisfied "if the information material to the creation, production, or distribution of the
15 communication was obtained from a publicly available source." 11 C.F.R. § 109.21(d)(2) and
16 (3). See also Explanation and Justification, *Coordinated Communications*, 71 Fed. Reg. 33190,
17 33205 (June 8, 2006) (explaining that "[u]nder the new safe harbor, a communication created
18 with information found . . . on a candidate's or political party's Web site, or learned from a
19 public campaign speech . . . is not a coordinated communication"). However, to qualify for the
20 safe harbor for the use of publicly available information, the person or organization paying for
21 the communication "bears the burden of showing that the information used in creating,
22 producing or distributing the communication was obtained from a publicly available source." *Id.*
23 As one way of meeting this burden, the person or organization paying for the communication

12044312203

1 may demonstrate that the information used in the communication was obtained from a publicly
2 available website. *Id.*

3 American Crossroads has demonstrated that the video footage of Rob Portman used in its
4 advertisement was obtained from publicly available sources, specifically videos on the YouTube
5 website that appear to have been posted by Rob Portman or the Portman Committee, and
6 therefore the advertisement qualifies for the safe harbor for use of publicly available information.

7 See <http://www.youtube.com/watch?v=3Xs3j8gjb08> and

8 <http://www.youtube.com/watch?v=10r6Y6cmoi4>. Both American Crossroads and the Portman

9 Committee have also specifically denied that representatives of the organizations had any contact
10 regarding the "Jobs for Ohio" advertisement and there is no information to suggest otherwise.

11 Thus, it does not appear that the request or suggestion, material involvement, or substantial
12 discussion conduct prongs are satisfied. The available information also does not indicate that the
13 common vendor or former employee conduct standards are satisfied. See

14 11 C.F.R. § 109.21(d)(4)-(5). There is no allegation in the complaint, nor did we find any

15 available information suggesting, that American Crossroads and the Portman Committee shared

16 a common vendor or that a former Portman Committee employee was working with American

17 Crossroads on its advertisement. Finally, the advertisement was not republication in the

18 coordination context because there is no available information suggesting that there was a

19 request or suggestion, material involvement, or substantial discussion that took place between

20 representatives of American Crossroads and the Portman Committee after the original

21 preparation of the campaign materials by the Committee.

22 In the absence of information that respondents satisfied any of the tests for the conduct

23 prong contained in 11 C.F.R. § 109.21(d)(1)-(6), we recommend that the Commission find no

12044312204

1 reason to believe that the Portman for Senate Committee and Natalie K. Baur, in her official
2 capacity as treasurer, violated 2 U.S.C. § 441a(f) by accepting an excessive in-kind contribution
3 from American Crossroads in the form of a coordinated communication.

4 **IV. CONCILIATION**

5 We recommend that the Commission enter into conciliation with American Crossroads
6 and Margee Clancy, in her official capacity as treasurer, prior to a finding of probable cause to
7 believe to settle violations resulting from its republication of campaign materials.

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

12044312205

V. RECOMMENDATIONS

1. Find reason to believe that American Crossroads and Margee Clancy, in her official capacity as treasurer, violated 2 U.S.C. §§ 441a(a) and 434(b) by making an excessive in-kind contribution as a result of republishing campaign materials and by failing to properly disclose the cost of the communication as a contribution.
2. Dismiss, as a matter of prosecutorial discretion, the allegations that American Crossroads and Margee Clancy, in her official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b by accepting excessive and prohibited contributions, and send a caution letter.
3. Find no reason to believe that the Portman for Senate Committee and Natalie K. Baur, in her official capacity as treasurer, violated 2 U.S.C. § 441a(f) by accepting an excessive in-kind contribution from American Crossroads in the form of a coordinated communication.
4. Authorize conciliation with American Crossroads and Margee Clancy, in her official capacity as treasurer, prior to a finding of probable cause to believe.
5. Approve the attached Conciliation Agreement.
6. Approve the attached Factual and Legal Analyses.

7. Approve the appropriate letters.

Christopher Hughey
Acting General Counsel

August 31, 2011
Date

BY:

Kathleen M. Guith
Kathleen M. Guith
Acting Associate General Counsel for
Enforcement

Susan L. Lebeaux
Susan L. Lebeaux
Acting Deputy Associate General Counsel
for Enforcement

Mark Shonkwiler
Mark Shonkwiler
Assistant General Counsel

Kasey S. Morgenheim
Kasey Morgenheim
Attorney

12044312207